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In re Application of LANDAZURI	:	
U.S. Application No.: 10/585,198	:	
PCT Application No.: PCT/EP2003/014985	:	DECISION
Int. Filing Date: 30 December 2003	:	
Priority Date Claimed: none	:	
Attorney Docket No.: KOB	:	
For: CREAM FILLER COMPOSITION AND	:	
METHOD FOR PREPARING	:	

This is in response to applicant's "Renewed Petition Under 37 CFR 1.47(b)" filed 03 January 2008.

### **BACKGROUND**

On 30 December 2003, applicant filed international application PCT/EP2003/014985. A copy of the international application was communicated to the USPTO from the International Bureau on 14 July 2005. The thirty-month period for paying the basic national fee in the United States expired on 30 June 2006.

On 30 June 2006, applicant filed national stage papers in the United States Designated/Elected Office (DO/EO/US). The submission was accompanied by, *inter alia*, the basic national fee required by 35 U.S.C. 371(c)(1).

On 16 February 2007, the DO/EO/US mailed a Notification of Missing Requirements Under 35 U.S.C. 371 (Form PCT/DO/EO/905), which indicated that an oath or declaration in compliance with 37 CFR 1.497 must be filed.

On 10 April 2007, applicant filed a response.

On 17 September 2007, the DO/EO/US mailed a Notification of Defective Response (Form PCT/DO/EO/916).

On 17 October 2007, applicant filed a petition under 37 CFR 1.47(b).

On 28 November 2007, this Office mailed a decision dismissing the 17 October 2007 petition.

On 03 January 2008, applicant filed the present renewed petition under 37 CFR 1.47(b).

### **DISCUSSION**

A petition under 37 CFR 1.47(b) must be accompanied by: (1) the fee under 37 CFR 1.17(i), (2) factual proof that the inventor refuses to execute the application or cannot be reached after diligent effort, (3) a statement of the last known address of the inventor, (4) an oath or declaration by the 37 CFR 1.47(b) applicant on behalf of and as agent for the non-signing inventor, (5) proof that the 37 CFR 1.47(b) applicant has sufficient proprietary interest in the application, and (6) a showing that such action is necessary to preserve the rights of the parties or to prevent irreparable damage. See 37 CFR 1.47(b).

Petitioner has previously satisfied items (1), (3), and (6) above.

With regard to item (2) above, MPEP 409.03(d) states in relevant part,

Where a refusal to sign the application papers is alleged, the circumstances of this refusal must be specified in an affidavit or declaration by the person to whom the refusal was made. Statements by a party not present when an oral refusal is made will not be accepted.

Before a refusal can be alleged, it must be demonstrated that a bona fide attempt was made to present a copy of the application papers (specification, including claims, drawings, and oath or declaration) to the nonsigning inventor for signature. A copy of the application papers should be sent to the last known address of the nonsigning inventor, or, if the nonsigning inventor is represented by counsel, to the address of the nonsigning inventor's attorney.

When there is an express oral refusal, that fact along with the time and place of the refusal must be stated in the affidavit or declaration. When there is an express written refusal, a copy of the document evidencing that refusal must be made part of the affidavit or declaration.

When it is concluded by the 37 CFR 1.47 applicant that a nonsigning inventor's conduct constitutes a refusal, all facts upon which that conclusion is based should be stated in the affidavit or declaration. If there is documentary evidence to support facts alleged in the affidavit or declaration, such evidence should be submitted. Whenever a nonsigning inventor gives a reason for refusing to sign the application oath or declaration, that reason should be stated in the affidavit or declaration.

The petition states that inventor Thomas Landazuri refuses to sign the application papers. Petitioner has adequately demonstrated that a bona fide attempt was made to present a copy of the application papers to the inventor for signature (see electronic mail message dated 26 September 2006 and affidavit of Carol Vandeputte). Furthermore, petitioner has sufficiently illustrated that the inventor refuses to sign. In particular, the inventor made an express written refusal to sign in the electronic mail message dated 03 October 2006 (see Vandeputte affidavit). Thus, it can be concluded with reasonable certainty that the inventor refuses to join in the application.

With regard to item (4) above, an oath or declaration executed by the 37 CFR 1.47(b) applicant on behalf of and as agent for the nonsigning inventor has been provided.

With regard to item (5) above, the 37 CFR 1.47(b) applicant must prove that, as of the date the application was deposited in the Patent and Trademark Office, (A) the invention has been assigned to the applicant, or (B) the inventor has agreed in writing to assign the invention to the applicant, or (C) the applicant otherwise has sufficient proprietary interest in the subject matter to justify filing of the application. MPEP 409.03(f).

In the present case, item (B) applies. Petitioner has furnished a copy of an employment agreement signed by the inventor. Such employment agreement specifies that inventions made by the employee during and as a result of his employment become property of the employer (See "Article 10" of Annex 3). Petitioner has provided an affidavit from Roland Coen, i.e. the person with purported firsthand knowledge of the present invention being made by the inventor during and as a result of his employment with the employer Amylum Belgium NV ("Amylum"). However, Mr. Coen's affidavit is insufficient. Specifically, the affidavit appears to suggest that because Mr. Coen prepared the draft proposal of the patent application related to the present invention, Mr. Coen necessarily had firsthand knowledge of the invention being made by the inventor. However, the fact that Mr. Coen prepared the draft proposal does not establish that Mr. Coen personally observed Mr. Landazuri actually making the present invention. If such personal observation was indeed made, Mr. Coen's affidavit should so state. If such personal observation was not made by Mr. Coen, then petitioner must supply an affidavit from the person who personally observed the making of the present invention by Mr. Landazuri.

### CONCLUSION

For the reasons above, the renewed petition under 37 CFR 1.47(b) is DISMISSED without prejudice.

If reconsideration on the merits of this petition is desired, a proper response must be filed within TWO (2) MONTHS from the mail date of this decision. Failure to timely file a proper response will result in abandonment of the application. Extensions of time under 37 CFR 1.136 are available. Any reconsideration request should include a cover letter entitled "Renewed Petition Under 37 CFR 1.47(b)." No additional petition fee is required.

Please direct further correspondence with respect to this matter to Mail Stop PCT, Commissioner for Patents, Office of PCT Legal Administration, P.O. Box 1450, Alexandria, Virginia 22313-1450, with the contents of the letter marked to the attention of the Office of PCT Legal Administration.



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